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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MAXIMILIAN KLEIN, *et al.*,

Plaintiffs,

vs.

META PLATFORMS, INC.,

Defendant.

Consolidated Case No. 3:20-cv-08570-JD

**ADVERTISER PLAINTIFFS' NOTICE OF
MOTION, MOTION TO EXCLUDE
OPINIONS OF DR. HOCHBERG, AND
MEMORANDUM IN SUPPORT**

Hearing Date: December 14, 2023
Hearing Time: 10:00 a.m.
Courtroom: 11, 19th Floor
Judge: The Honorable James Donato

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NOTICE OF MOTION AND MOTION TO EXCLUDE OPINIONS OF DR. HOCHBERG

PLEASE TAKE NOTICE THAT on December 14, 2023 at 10:00 a.m., in Courtroom 11, 19th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable James Donato, Plaintiffs Affilious, Inc., Jessyca Frederick, Mark Young, 406 Property Services, PLLC, and Mark Berney, on behalf of themselves and all others similarly situated, will and do now move the Court for an order excluding the testimony of Defendant Meta Platforms, Inc.'s proffered expert Dr. Yael Hochberg, on the ground that it is not admissible under Federal Rule of Evidence 702. This motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities, the concurrently-filed declaration of Amanda F. Lawrence, and the exhibits to that declaration, the concurrently-filed Proposed Order, the records on file in this action, and any argument that may be presented at or before the hearing on this Motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

Advertisers move to exclude the opinions of Dr. Yael Hochberg, proffered by Defendant Meta Platforms, Inc. (“Meta”) as an expert on monopoly power and antitrust damages in response to Advertisers’ experts, Kevin Kreitzman and Dr. Michael A. Williams. Dr. Hochberg lacks any experience or training in the highly specialized field of antitrust economics, the subject upon which she purports to opine. [REDACTED]

[REDACTED] Dr. Hochberg’s failure to adhere to even the most basic concepts of antitrust economics permeates each of her proffered opinions and testimony. This alone warrants exclusion.

Furthermore, in addition to being unqualified, Dr. Hochberg’s methodology is, at best, unreliable and, at worst, entirely irrelevant and unduly prejudicial. Dr. Hochberg’s critiques of [REDACTED]

[REDACTED] However, none of those observations, to the extent they carry any merit, require an expert opinion. [REDACTED]

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1 Accordingly, the Court should exclude Dr. Hochberg's testimony in its entirety. Should the
2 Court determine Dr. Hochberg is qualified to opine on monopoly power and antitrust damages, it
3 nevertheless should exclude the opinions expressed in Sections III, V, and VI of her report.

4 **BACKGROUND**

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Dr. Hochberg does not even claim to be an expert in antitrust economics. [REDACTED]

23 [REDACTED]
24 [REDACTED]

25 _____
26 ¹ Exhibit citations are to the Declaration of Amanda F. Lawrence in Support of Advertiser
27 Plaintiffs' Motion to Exclude Opinions of Dr. Hochberg, filed concurrently herewith. Emphasis is
28 added and citations are omitted unless otherwise noted.

² [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 Nonetheless, Dr. Hochberg offers six principal opinions in her report [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 [REDACTED] The Court should exclude all six.

26
27 3 [REDACTED]
28 [REDACTED]

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Expert testimony is admissible only if it is relevant and reliable. However, “[t]he question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular scientific field.” *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995). That is, an expert witness must be qualified by “‘knowledge, skill, experience, training or education’ as to the subject matter of the opinion.” *In re Apple iPhone Antitrust Litig.*, No. 11-CV-6714-YGR, 2022 WL 1284104, at *2 (N.D. Cal. Mar. 29, 2022) (quoting FRE 702).

Even if an expert is qualified, the “district court must distinguish an expert’s *qualifications* from the *reliability* of the expert’s principles and methods.” *United States v. Holguin*, 51 F.4th 841, 854 (9th Cir. 2022) (emphasis in original). “[S]omething doesn’t become ‘scientific knowledge’ just because it’s uttered by a scientist; nor can an expert’s self-serving assertion that his conclusions were ‘derived by the scientific method’ be deemed conclusive.” *Daubert*, 43 F.3d at 1315-16. Rather, the Court, as gatekeeper, examines “the full picture of the expert[’s] methodology” to “prevent[] shoddy expert testimony and junk science from reaching the jury.” *Murray v. S. Route Mar. SA*, 870 F.3d 915, 923 (9th Cir. 2017). In other words, the proponent of the testimony must demonstrate (a) “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue,” the opinions are (b) “based on sufficient facts or data,” (c) are “the product of reliable principles and methods,” and (d) the expert “reliably” applied those principles and methods to the facts of the case. FRE 702.⁴

⁴ The Supreme Court of the United States has ordered an update to FRE 702 to take effect in December, replacing subsection (d) and clarifying that the proponent must prove admissibility by a preponderance of the evidence. See https://www.supremecourt.gov/orders/courtorders/frev23_5468.pdf. As this Court has observed elsewhere, the “proposed amendment is not a sea change but rather an amplification of existing FRE 702 standards.” *In re Google Play Store Antitrust Litig.*, No. 3:21-md-02918, ECF No. 588 (N.D. Cal. Aug. 28, 2023), at 9.

FILED UNDER SEAL**ARGUMENT****I. DR. HOCHBERG IS NOT QUALIFIED TO TESTIFY AS TO MONOPOLY POWER OR ANTITRUST DAMAGES**

As set forth above, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g., Maldonado v. Apple, Inc.*, No. 3:16-CV-04067-WHO, 2021 WL 1947512, at *18 (N.D. Cal. May 14, 2021) (“Apple has not met its burden to show that a chemical (or nuclear) engineer has the knowledge, training, skill, or experience to opine about reliability science without any other expertise in that field merely because he is also a type of engineer.”).

Like reliability science in *Maldonado*, antitrust economics “is a specific field with its own established principles.” *Id.*, at *17; *see also* Ex. 3 (*The Sedona Conference on the Role of Economics in Antitrust Law*, 7 SEDONA CONF. J. 69 (2006)), at 83 (hereinafter, “Sedona Conf.”) (Principle I-1, Comment) (“Economics is highly specialized, as are many of the particular applications of economics in antitrust cases.”). “The qualifications of an economic expert must be evaluated in the light of the specialized nature of the analysis that may be performed in antitrust cases.” *Id.* (Principle I-1). Thus, “[a] witness with a Ph.D. in economics, and even a Nobel Prize, nevertheless may be unqualified to testify about a particular issue or to apply a particular method.” *Id.* Courts, for example, have concluded that a respected Ph.D. economist may still be excluded as unqualified to testify on antitrust subjects, such as the relevant market, because the proffered witness had “no background in antitrust markets” and “was not a member of any associations or industrial organization groups which form the bulwark of economists specializing in antitrust law and economics.” *Nelson v. Monroe Reg’l Med. Ctr.*, 925 F.2d 1555, 1572 (7th Cir. 1991) (Pell, J., concurring). *See also Gulf States Reorganization Grp., Inc. v. Nucor Corp.*, 822 F. Supp. 2d 1201, 1232 (N.D. Ala. 2011) (affirming special master’s exclusion of unqualified experts who lacked “any relevant training or experience in antitrust economics”), *aff’d*, 721 F.3d 1281 (11th Cir. 2013); *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799-800 (4th Cir. 1989) (expert with MBA

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1 and experience analyzing companies' business health not qualified to give antitrust testimony where
 2 she had no specific education or experience in antitrust matters).

3 Here, Dr. Hochberg has admitted [REDACTED]
 4 [REDACTED]
 5 [REDACTED] *See, e.g., Kleen Prods. LLC*
 6 *v. Int'l Paper*, No. 10 C 5711, 2017 WL 2362567, at *24 (N.D. Ill. May 31, 2017) (excluding
 7 testimony of rebuttal expert who admitted at deposition that he "is not an antitrust expert"); *United*
 8 *States v. Bazaarvoice, Inc.*, No. 13-CV-00133-WHO, 2014 WL 11297188, at *2 (N.D. Cal. Jan. 21,
 9 2014) (excluding antitrust opinions of expert who "admits that he has no expertise regarding any of
 10 the antitrust issues in the case, such as market shares, competitive effects, unilateral effects or
 11 entry"). [REDACTED]

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED] "general
 17 business experience unrelated to antitrust economics does not render a witness qualified to offer an
 18 opinion on complicated antitrust issues." *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 214 F. Supp. 2d
 19 530, 536 (D. Md. 2002). Finally, Dr. Hochberg's general training and experience [REDACTED]
 20 [REDACTED] *Maldonado*, 2021 WL 1947512, at *18 ("that an opinion
 21 is held out as based on 'good science generally' is not sufficient; *Daubert* requires experts to be
 22 qualified in the pertinent field, not just that a principle be widely established (assuming this one
 23 is)").

24 Because Dr. Hochberg's opinions on monopoly power and antitrust damages [REDACTED]
 25 [REDACTED], the
 26 Court should exclude her entire report and all of her opinions.

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1 **II. DR. HOCHBERG’S FALSE CLAIM THAT FIRMS WITH MONOPOLY POWER**
 2 **HAVE NECESSARILY ENGAGED IN ANTICOMPETITIVE CONDUCT**
 3 **DEMONSTRATES HER LACK OF QUALIFICATIONS AND RENDERS SECTION**
 4 **III OF HER REPORT AND THE OPINIONS EXPRESSED THEREIN UNRELIABLE**

5 In Section III of her report, [REDACTED]
 6 [REDACTED]
 7 [REDACTED]

8 Not only does this demonstrate her lack of qualifications to opine on
 9 monopoly power and antitrust damages, but it renders the whole of Section III of her report
 10 unreliable.

11 Under black-letter antitrust law, monopoly power and anticompetitive conduct are distinct
 12 concepts; a firm can have monopoly power without engaging in any anticompetitive conduct. *See*
 13 Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST*
 14 *PRINCIPLES AND THEIR APPLICATION*, §650 (“[T]he possession of monopoly power will not be found
 15 unlawful unless it is accompanied by an element of anticompetitive *conduct*.” (emphasis in
 16 original)). Likewise, the definition of monopoly power is well established in the field of industrial
 17 organization. As Professor Schmalensee states, a firm with “substantial market power (or,
 18 equivalently, monopoly power)” is “one that is able to enhance its profits by raising prices
 19 substantially above marginal costs for a substantial volume of sales.”⁵ Similarly, Professors Carlton
 20 and Perloff state in a widely used industrial organization textbook: “It is common practice to say
 21 that whenever a firm can profitably set its price above its marginal cost without making a loss, it has
 22

23 ⁵ Richard Schmalensee, *Standards for Dominant Firm Conduct: What Can Economics*
 24 *Contribute?*, *THE ECONOMICS OF MARKET DOMINANCE* (1985) (Ex. 4), at 3, 61-88. (“The meanings
 25 attached to ‘dominant firm’ and ‘monopoly’ in the antitrust context are broader than the definitions
 26 of those terms in economic theory. A ‘dominant firm’ in economic theory is generally a single large
 27 seller facing many small, price-taking rivals, while a ‘monopoly’ is the only seller of some good or
 28 service. In antitrust, both terms are generally used to refer to a seller that is able to exercise substantial
 market power (or, equivalently, monopoly power) unilaterally, without the need for collusive
 arrangements. . . . Most firms in developed economies have some market power; only a few have
 enough to be characterized as ‘dominant’ or ‘monopolies.’ There is essentially no basis in economics
 for the existence of a sharp dividing line between ‘dominant’ firms and others, however, since market
 power is measured along a continuum.”).

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1 *monopoly power or market power.*⁶ As these definitions make clear, there is no necessary
 2 relationship between “monopoly power” and the exercise of anticompetitive conduct. Rather, “[i]t
 3 is a common mistake to think that the antitrust laws prohibit monopoly. They do not; however, they
 4 do prohibit certain actions that could allow a firm to acquire or maintain monopoly power.”⁷

5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]

19 Dr. Hochberg’s critiques find no support in antitrust law or academic literature. *See* Sedona Conf., 7
 20 Sedona Conf. J. at 85 (Principle I-3, Comment) (“the testimony from a witness qualified as an expert
 21 in aspects of economics must be excluded if the principles of economics are not being applied”). [REDACTED]

24 _____
 25 ⁶ Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* (4th ed. 2005) (Ex. 5) at 93, 245, Table. 81 (emphasis in original).

26 ⁷ *Id.* at 679.

27 ⁸ Hochberg Errata, ¶33.

28 ⁹ *Id.*

¹⁰ *Id.*, ¶36.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dr. Hochberg, again, misses the mark. [REDACTED]

[REDACTED]

[REDACTED] See Franklin M. Fisher, *Economic Analysis and 'Bright-Line' Tests*, 4 J. OF COMPETITION L. AND ECONS. 1 (2007) (Ex. 6). To the contrary, Professor Fisher defines monopoly power [REDACTED]: "Monopoly power is the power to raise prices above (or reduce quality below) the competitive level for a significant period of time." *Id.* at 137.

Dr. Hochberg's [REDACTED].¹¹ Monopoly power and anticompetitive conduct are distinct concepts; a firm can have monopoly power without engaging in

¹¹ Dr. Hochberg repeated [REDACTED]

[REDACTED]

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1 any anticompetitive conduct. As a result, the fundamental premises underlying Section III of Dr.
2 Hochberg's report are little more than *ipse dixit*, divorced from well-established legal and economic
3 concepts and wholly inapplicable to Kreitzman's and Williams' methodology. Accordingly, because
4 the "analytical gap between the data and the opinion offered" here is "simply too great," testimony
5 concerning the opinions contained in Section III should be excluded. *Gen. Elec. Co. v. Joiner*, 522
6 U.S. 136, 146 (1997).

7 **III. DR. HOCHBERG'S EMPIRICAL ANALYSIS OF OTHER FIRMS' ECONOMIC**
8 **PROFITABILITY IS IRRELEVANT AND PREJUDICIAL JUNK SCIENCE**

9 Dr. Hochberg also attempts [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 As a threshold matter, Dr. Hochberg's [REDACTED] are simply
15 irrelevant. *See Utne v. Home Depot U.S.A., Inc.*, No. 16-CV-01854-RS, 2022 WL 16857061, at *3
16 (N.D. Cal. Nov. 10, 2022) ("Expert testimony which does not relate to any issue in the case is not
17 relevant and, ergo, non-helpful."). [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] Far from disproving the reliability of Kreitzman's and Williams'
12 methodology, [REDACTED]
13 [REDACTED]

14 More fundamentally, [REDACTED]
15 [REDACTED]
16 [REDACTED]¹³ This vague and
17 faulty anecdotal reasoning is the quintessential opposite of an inference "derived by the scientific
18 method." *Daubert*, 509 U.S. at 590. It is cherry-picked junk science done under the guise of
19 expertise, which courts regularly exclude under the *Daubert* standard. *In re Apple iPhone Antitrust*

20
21 ¹² Dr. Hochberg attempted [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 ¹³ For example, she [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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1 *Litig.*, No. 11-CV-6714-YGR, 2022 WL 1284104, at *3 (N.D. Cal. Mar. 29, 2022) (excluding the
2 testimony of Nobel laureate whose proposed but-for commission rate “was cherry-picked from a few
3 data points”).

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 **IV. NONE OF THE OPINIONS CONTAINED IN SECTIONS V AND VI OF DR.**
18 **HOCHBERG’S REPORT REQUIRE SPECIALIZED EXPERTISE TO WARRANT**
19 **EXPERT TESTIMONY**

20 The Court should exclude the final two opinions provided in Dr. Hochberg’s report. [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

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1 Setting aside that both contentions are fatally unreliable,¹⁴ they do not require the assistance
 2 of an expert witness to make them. *See, e.g., DZ Rsrv. v. Meta Platforms, Inc.*, No. 3:18-CV-04978-
 3 JD, 2022 WL 912890, at *9 (N.D. Cal. Mar. 29, 2022) (Donato, J.) (excluding opinions of proposed
 4 witness whose “report does not offer any specialized or scientific expertise, or anything beyond the
 5 typical knowledge and experience of a jury”). Rather, both criticisms are derived by [REDACTED]

6 [REDACTED]
 7 Indeed, [REDACTED] Dr. Hochberg [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]

15 [REDACTED] Such basic arithmetic and multiplication are “reasonably
 16 intelligible to a jury without special assistance.” *DZ Rsrv.*, 2022 WL 912890, at *9.

CONCLUSION

17
 18 For the foregoing reasons, the Court should exclude the testimony of Dr. Hochberg as
 19 unqualified. To the extent the Court determines Dr. Hochberg is qualified as an expert in monopoly
 20 power and antitrust damages, it should exclude the opinions expressed in Sections III, V, and VI of
 21 her report on the grounds set forth herein.

22
 23 ¹⁴ Dr. Hochberg ignores [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED] *See*
 27 *Senne v. Kansas City Royals Baseball Corp.*, 591 F. Supp. 3d 453, 478 (N.D. Cal. 2022). Instead,
 28 she admitted that [REDACTED]
 [REDACTED]

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Dated: October 6, 2023

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FILER ATTESTATION

I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: October 6, 2023

By: /s/Amanda F. Lawrence
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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, I caused a true and correct copy of the foregoing document to be served by electronic mail on all counsel of record.

Dated: October 6, 2023

By: /s/Amanda F. Lawrence
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